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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 561

KENNETH L. HOSTETLER, EARL ALBERTSON, JUNIOR A. AVERS, WALLACE L. AVERS, HUBERT BALL, JOSEPH B. BLACKER, MARVIN D. CLEM, MILTON RICHARD COCHRAN, THOMAS P. COUNIHAN, CURTIS V. DEVELBISS, MAHLON A. LEATHERMAN, DANIEL R. NOBLE, HARLEY M. SAVILLE, GEORGE A. STAFFORD, GEORGE E. THOMAS AND RAYMOND F. ZEGLES, *Petitioners*,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, AND GENERAL GRIEVANCE COMMITTEE, BROTHERHOOD OF RAILROAD TRAINMEN, BALTIMORE & OHIO SYSTEM, *Respondents*.

JAMES F. DECKER, GEORGE D. BEAL, JOHN D. CLARK, GEORGE H. R. DAVIS, LOUIS R. DAVIS, MICHAEL D. GLEASON, ARCHIE LEWIS, HARRY L. NINES, RAY C. RESH, WILLIAM R. SAMPSELL, FRANK L. G. T. SMITH, FRANK A. TROZZO AND JACK W. WHITTINGTON, *Petitioners*,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Kenneth L. Hostetler, et al., and James F. Decker, et al., (including all of the twenty-nine appellants named above)

pray that a writ of certiorari issue to review the judgment entered in this cause on September 21, 1961, by the United States Court of Appeals for the Fourth Circuit.

(a) OPINIONS BELOW

The majority opinion of the United States Court of Appeals and the opinion of Judge Bryan, concurring in part and dissenting in part, are officially reported in 287 F. 2d at pp. 457 and 461, respectively, and are reprinted herein. The Court's opinion on motion for rehearing is likewise reprinted herein but has not yet been officially reported. The opinion of the United States District Court and its Order modifying said opinion are printed at pp. 96 and 120, respectively, of Appellants' Appendix in the Court of Appeals, copies of which are furnished with this Petition. The opinion itself is reported in 183 F. Supp. 281, but the Order of Modification is unreported. The Court's subsequent Memorandum (filed after the case had been appealed to the Court of Appeals) is printed at p. 121 of Appellants' Appendix but is unreported.

(b) JURISDICTION

The judgment of the United States Court of Appeals, which is here sought to be reviewed, was originally entered on February 23, 1961. Motion for rehearing was seasonably filed and was denied on September 21, 1961. The Order denying rehearing, constituting the final judgment of the United States Court of Appeals, was dated and entered on September 21, 1961. The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 1254(1).

(c) QUESTIONS PRESENTED FOR REVIEW

The questions in this litigation relate to (1) the duty of a union bargaining representative to refrain from discrimination in enforcing a union shop agreement, and its similar duty to enforce such agreement only for the legitimate purpose of compelling payment of dues and not for extraneous reasons and motives such as the punishment of employees who joined a rival union; (2) the propriety of action by a Court of Appeals in weighing evidence as to disputed facts bearing on discrimination and making findings thereon, rendering a final decision on motion for summary judgment instead of permitting a plenary trial by jury on such factual issues; (3) whether, in view of proof of malicious motivation on the part of the bargaining representative, it should be required to consent to the Railroad's voluntary reemployment of the discharged employees with full seniority, and (4) questions relating to applicability of *International Assn. of Machinists v. Street*, 367 U.S. 740 (these Appellants having filed a brief as *amicus curiae* therein).

The exact questions before the Court can be stated only in terms of the particular factual situation, in the framework of the history of the case.

As presented to the courts, this litigation concerning the administration of a union shop agreement under the Railway Labor Act is wholly between the discharged employees and the union. The Railroad is not a party and has agreed with the employees to reinstate them *with full seniority* if the defendant Brotherhood will permit. (Under the Act they are admittedly entitled at least to be employed as new workmen, without seniority, but the denial of seniority results in depriving them of their

of livelihood, as shown in Judge Bryan's opinion, *infra*, at pp. 25, 28-30.)

The action began as one for damages for wrongfully causing Appellants' discharge. Appellants further sought, by amendment, alternative equitable relief in the form of an order compelling the Brotherhood to consent to their reinstatement with seniority.

The first, or basic, legal question is:

I.

Is a Union bargaining representative's duty under the Railway Labor Act to represent all employees fairly and without hostile discrimination in the administration of a Union Shop Agreement, and to invoke discharge procedures for no purpose except to compel payment of dues, violated by hasty and discriminatory prosecutions of certain employees under the Union Shop Agreement which are motivated by a grudge against them due to activity in aiding a rival Union?

The District Court granted summary judgment for the Brotherhood, holding that its motives in acting within its contractual and statutory rights to compel plaintiffs' discharge were immaterial. See Applts. App., pp. 103-104; 183 F. Supp. at p. 287.

The majority of the Court of Appeals, "assuming that the discrimination in both citation and reinstatement alleged in the pleadings would constitute a cause of action", nevertheless affirmed the summary judgment against Appellants. It purported to review the incomplete record *as presented for purposes of summary judgment*, and found that the charge of unlawful discrimination was not established. In so doing, it weighed certain evidence and inferences

therefrom as trier of fact instead of considering whether there were disputed issues of fact to be determined on a plenary trial; and it ignored the clear written evidence as to the Brotherhood's malicious motivation, summarized in Judge Bryan's separate opinion (287 F. 2d at pp. 462-3). Thus, the majority opinion appears to represent a decision on the facts depriving Appellants of their right to a jury trial on disputed facts. Indeed, the Reporter's Headnote No. 4, 287 F. 2d 457, states:

> "Evidence sustained finding that railroad union citing plaintiffs to railroad after their failure to pay dues, did not unlawfully discriminate against plaintiffs".

Considering Appellants' request for equitable relief, the Court of Appeals found that they had in good faith sought to comply with the union shop agreement by joining another union deemed to be qualified, and concluded that it would be "disposed under these circumstances to order the Union to permit reinstatement with seniority" but for the decision in *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, which, it held, precluded such relief.

Judge Bryan's dissenting opinion states and considers the clear evidence of the union's improper motives in seeking to compel Appellants' discharge, evidence which was not mentioned in the majority opinion. He distinguished the *Rychlik* case as involving the liability of the Railroad, as to which equities existing between the union and the employees would be immaterial. Accordingly, he held that Appellants were entitled to a plenary trial on the merits of their equitable claim.

The turn which the case has taken in the Court of Appeals therefore presents these questions:

II.

Where there are material facts in dispute as to the Brotherhood's discrimination against Appellants in administration of its Union Shop Agreement, and as to its motives in invoking the agreement against them, were Appellants deprived of their right to a jury trial by the granting of motions for summary judgment without a trial on the merits?

III.

Where the Brotherhood was motivated by a grudge against Appellants, for their rival union activity, in its prosecution of them under the Union Shop Agreement, and Appellants had in good faith sought to comply with the agreement by alternate union membership, are they entitled to relief in equity through an order compelling the Brotherhood to consent to their reinstatement with seniority in their employment, as agreed by the Railroad?

This Court may, further, wish to review the question discussed in the opinions in the Court of Appeals as to whether Appellants are entitled to relief similar to the relief accorded plaintiffs in *International Association of Machinists v. Street*, 367 U.S. 740. This question may be stated as follows:

IV.

Where Appellants complained of misapplication of union dues funds to political purposes, by amending their pleadings as soon as they learned thereof (as in Street), are they entitled to relief similar to that accorded the Street Plaintiffs?

(d) STATUTES INVOLVED

The Jurisdiction of the District Court

U.S. Code, tit. 28, sec. 1337, provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies".

General

The particular "Act of Congress regulating commerce" under which the action arises is the Railway Labor Act, especially U.S. Code, tit. 45, Sec. 152, Eleventh, the so-called "union shop amendment" which was adopted in 1951. This section is voluminous and is therefore printed in Appendix A to this Petition.

The basis for federal jurisdiction is further discussed *infra* in "Statement of the Case".

(e) STATEMENT OF THE CASE

The facts are largely summarized in the majority and separate opinions of the Court of Appeals (see Appendix B) and certain salient facts have been referred to heretofore (see "Questions Presented for Review").

Because of the factual basis adopted by the Court of Appeals for its decision, it will be convenient to refer to additional portions of the Record bearing on the motives of the Brotherhood and its discrimination against Appellants, as appearing in their Appendix.

As to Motives of BRT

As stated by Judge Bryan, "the bitterly vengeful attitude of the Brotherhood is manifested by its conduct towards the trainmen. On September 3, 1953, within three months after the last withdrawals by the plaintiffs from

BRT, the General Chairman of its Grievance Committee rejected an application for reinstatement to the union of a former member because the applicant had joined UROC. This rejection was publicized to all of the plaintiffs as notice of the union's intentions toward them." Judge Bryan then summarizes the letter, which appears in full at Applts. App. 52-54.

The attitude of BRT toward the Appellants is further shown by its actions in (1) refusing to approve informal curative procedures as to back dues which had hitherto been permitted and still were permitted to others (Applts. App. 76, 78-79, 61); (2) insisting that appellants were no longer members, although they had not resigned, and that formal applications for membership would be required of them if they desired to pay up their back dues although not of others (pp. 92-93); (3) refusing to furnish such application forms on request (pp. 75, 78, 88-89, 92-93); (4) ignoring forms which were sent in (p. 85), and (5) hastily invoking inforcement procedures against Appellants and refusing to consider for reinstatement those who had been cited (pp. 64, 89; also summary by Court p. 62).

As to additional matters bearing on motives of the BRT, see pp. 58, 63, 69, 78.

Discrimination

Hasty expulsion and citation of many of the plaintiffs is shown in the Tables and Charts (pp. 35, 37, 41*), at least thirteen being "expelled" from the BRT the day following the last date to which dues were paid, and "cited" to the Railroad within two to eight weeks thereafter. In contrast, the practice and policy of the BRT had always been to allow up to many months' grace in payment of dues, according to testimony at administrative hearings given

* Dates of expulsion shown at pp. 43-47.

by a number of the plaintiffs (pp. 73-74, 76, 78-79, 81-83, 86, 89-90). The Brotherhood's General Chairman on the B. & O. did not deny that this policy of leniency existed (p. 77).

See also instances of discrimination noted in the preceding paragraph.

Basis for Federal Jurisdiction

The District Court had jurisdiction of the action in the first instance as it arose under the Railway Labor Act, particularly U.S. Code, Title 45, Sec. 152 Eleventh, asserting breach by the Defendant Brotherhood of its fiduciary obligations as bargaining representative owed to Appellants as employees. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood*, 323 U.S. 210; *Ford Motor Company v. Huffman*, 345 U.S. 330; *Conley v. Gibson*, 355 U.S. 41. The question of jurisdiction is discussed in the District Court's opinion (Applts. App. 100) and in the opinion of the Court of Appeals (this App. p. 21) and decided in favor of the Appellants by both courts.

REASONS FOR GRANTING THE WRIT

1. Decision Contrary to Views Prevailing in Four Other Circuits.

The decision that the conduct of the union, notwithstanding the evidence of hostile motivation and discrimination, did not violate its fiduciary obligations appears to place the Court of Appeals squarely in opposition to decisions of the Courts of Appeals of the Second, Fifth, Sixth and Ninth Circuits.

Second Circuit—

N.L.R.B. v. Biscuit & Cracker Workers Union (1955), 222 F. 2d 573;

International Ass'n. of Machinists v. N.L.R.B. (1957), 247 F. 2d 414;
Cunningham v. Erie R. Co. (1959), 266 F. 2d 411.

Fifth Circuit—

N.L.R.B. v. Pape Broadcasting Co. (1954), 217 F. 2d 197.

Sixth Circuit—

J. A. Utley Co. v. N.L.R.B. (1954), 217 F. 2d 885.

Ninth Circuit—

N.L.R.B. v. Technicolor Corp. (1957), 248 F. 2d 348.

In all of these cases, substantial discrimination or hostile motivation in the invocation of union security contract provisions was alleged or shown, and in each instance the court held that these facts, if found, would justify relief against the union bargaining representative and, in some instances, against the employer if it participated with knowledge of the union's discrimination. In each of the cases the court found or assumed for purposes of its reasoning that there had been a default in payment of dues but specifically held that this did not excuse discriminatory enforcement.

In *International Assn. of Machinists v. N.L.R.B.*, *supra*, the Court of the Second Circuit sent a case to trial on the merits to ascertain whether union demands for discharge under a union shop agreement "were based, even in part, upon some grounds other than non-payment of dues", such as "union pique" over the employee's actions. Similarly, in *N.L.R.B. v. Biscuit & Cracker Workers*, *supra*, the Court allowed relief to the employee upon concluding that "the facts of this case leave no doubt that the union caused Borg's discharge not for his failure to pay union dues —

though concededly his dues were in arrears — but solely because of his outburst in the union office." The same Court, in *Cunningham v. Erie R. Co., supra*, sent a Railway Labor Act case to trial to determine whether the union had failed in its duty "to forbear from hostile discrimination" in prosecuting the plaintiff under the union shop agreement.

The *Pape Broadcasting Company* case, *J. A. Utley Co. v. N.L.R.B.*, and *N.L.R.B. v. Technicolor Corp., supra*, are decisions in the Fifth, Sixth and Ninth Circuits, respectively, similar to the decisions in the *Machinists* and *Biscuit Workers* cases.

2. Decision in Conflict with Applicable Decisions of Supreme Court.

The decision that no relief can be granted to the Appellants, notwithstanding the hostile motivation of the union in prosecuting them, appears to decide a federal question in conflict with applicable decisions of this Court.

Radio Officers Union A.F.L. v. N.L.R.B., 347 U.S. 17;
Steele v. Louisville & N.R. Co., 323 U.S. 192;
Conley v. Gibson, 355 U.S. 41.

The above line of cases is undoubtedly familiar to the Court and requires no detailed discussion. In *Radio Officers Union* this Court said, in discussing the union shop provisions of the Labor Relations Act, as amended in 1947 by the Taft-Hartley Act, the "legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." This would seem clearly to call for an inquiry into the motives of the bargaining

representative where there is evidence, as here, of extreme hostility toward the employees against whom the agreement is invoked.

3. Misapplication of Supreme Court Decision in Rychlik Case.

The denial of relief in equity, which the Court of Appeals says it would otherwise be disposed to grant, is based solely on the majority's erroneous conception that *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, precludes such relief.

Cf. the majority opinion's analysis of that case (App. 23) with Judge Bryan's analysis (App. 31).

In the entire *Rychlik* litigation (two reported opinions of the District Court, one of the Court of Appeals and two in this Court) there is no indication whatever of any contention that *Rychlik* was the victim of discrimination or of malicious motivation on the part of the union. The entire claim was grounded on the supposed position of "UROC" as a qualified union "national in scope", to which the employee could belong and thereby maintain alternative union membership protecting his employment. The Court of Appeals, assuming the status of U.R.O.C. to be a factual question, concluded that it was improper for a final decision to be rendered against Rychlik by a system board of adjustment, one-half of whose members represented the Brotherhood. When this Court determined that U.R.O.C. was not qualified, as a matter of law, the whole basis of the litigation collapsed.

Moreover, the *Rychlik* case was a suit to require *both the Railroad and the Brotherhood* to reinstate the employee. To that extent it was a dispute between an employee and a carrier, of which an administrative board would have primary jurisdiction. Not so in this case, for

here the Railroad has consented to reinstate Appellants and only the Brotherhood need be placed under compulsion; it is the sole party with whom Appellants have a dispute.

Judge Knight's decision in the District Court in *Rychlik* held that there was no sufficient ground alleged for intervention by a court of equity (128 F. Supp. at pp. 454-55). In this Court, Mr. Justice Frankfurter's concurring opinion, while it does not accept the view that U.R.O.C. was unqualified as a matter of law, nevertheless concludes that the District Court lacked jurisdiction to grant relief because there was no allegation of arbitrary or inequitable conduct, and the case was therefore not brought within the principle of *Steele v. Louisville & N.R. Co., supra.*

He refers to the *Steele* case as stating a "counter-principle to be respected." (352 U.S. at p. 430).

In the instant case the "counter-principle" is invoked by apt allegations and proffered proof. The hostile and arbitrary conduct of BRT in prosecuting Appellants is the foundation of their claim for relief, and *Rychlik*, which does not deal with that problem, is patently inapplicable.

4. Decision Rendered on Summary Judgment in Conflict with Supreme Court Decisions as to Right of Jury Trial.

In deciding to deny Appellants a plenary trial on the issues of malice and discrimination, notwithstanding the evidence presented on summary judgment, and in evaluating the evidence, accepting the Brotherhood's explanation of its reasons for discriminating, and ignoring the facts tending to show express malice, the Court of Appeals has decided a controlling procedural question in a way in conflict with numerous decisions and statements of this Court and with the whole course of American decisions protecting the right to jury trial of disputed facts.

See, e.g., *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, at p. 35.

The principle is clear and unquestioned; its application depends upon review of the Record available to the trial court on Defendants' Motion for Summary Judgment. In the separate opinion of Judge Bryan and in earlier portions of this Petition some of the evidence, which at least placed the questions of malice and discrimination in dispute, has been summarized or referred to. Upon consideration of the Record, it is confidently predicted that this Court will find a clear disregard of the right of Appellants to have a jury trial upon the disputed material questions of fact in the case, as bearing upon their action for damages against the Brotherhood for the wrongs they have suffered.

CONCLUSION

In this day when powerful economic units, representing large aggregations of capital or labor, are given broad scope to regulate conditions in industry, it is of paramount importance that the courts should protect the rights of individuals against arbitrary abuses of these powers. Particularly in the invocation of union security agreements for an unworthy purpose, to punish those individuals who have dared to disagree, powerful and irresponsible labor leaders may need the corrective and restraining hand of the courts.

The present case involves not only the livelihood of the forty or more plaintiffs and their families, destroyed by hostile union leaders to satisfy a grudge; it involves also a principle of restraint applicable to all those in fiduciary positions in the labor field which requires enunciation and restatement by this Court as a charter of the minimum rights of the individual workingman, — one who in good

faith supports collective bargaining but does not submit to all the regimentation of thought and action desired by some of the more powerful labor groups.

In this sense, the case assumes a broad public importance which transcends the substantial individual rights sought to be protected by the review herein requested.

Respectfully submitted,

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APPENDIX A

U. S. CODE, TIT. 45, SEC. 152 ELEVENTH

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, *that within sixty days following* the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: PROVIDED, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of employees, of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: PROVIDED, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees,

and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deduction from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: PROVIDED, However, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: PROVIDED, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

APPENDIX B

OPINIONS OF THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8185.

Kenneth L. Hostetler, Earl Albertson, Junior A. Avers, Wallace L. Avers, Hubert Ball, Joseph B. Blacker, Marvin D. Clem, et al.,

Appellants,

versus

Brotherhood of Railroad Trainmen, an unincorporated association, and General Grievance Committee, Brotherhood of Railroad Trainmen, Baltimore & Ohio System,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
ROSZEL C. THOMSEN, DISTRICT JUDGE.

(Argued November 8, 1960. Decided February 23, 1961.)

Before SOBELOFF, Chief Judge, SOPER, Circuit Judge, and BRYAN, District Judge.

Herbert M. Brune (Meyer Fix on brief) for Appellants, and Bernard M. Savage (Wayland K. Sullivan on brief) for Appellees.

PER CURIAM:

For many years the appellants had been employees of the Baltimore and Ohio Railroad Company and members of the Brotherhood of Railroad Trainmen (BRT). In September, 1951, the B. & O. and BRT entered into a union shop agreement, pursuant to the Railway Labor Act,[1] requiring

[1] 45 U.S.C.A. section 152, Eleventh (a) and (c).

employees in the crafts represented by BRT to become, as a condition of continued employment, members of that or of another union national in scope and organized in accordance with the Act. At various times in the fall of 1952 these appellants stopped paying dues to the Brotherhood and joined a newly formed labor organization, known as the Union of Railroad Operating Crafts (UROC). This union was later held by the Supreme Court not to be "national in scope" and not "organized in accordance with the Act," as it had never qualified under Section 3, First of the statute.[2] *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480 (1957). Thus, the Supreme Court decided that membership in UROC was not compliance with the maintenance of union membership provision of the union shop agreement. Of course, this infirmity in the status of UROC was not known to the appellants when they withdrew from BRT and joined UROC in 1952. They believed that UROC membership was compliance with the union contract, and it was not finally determined until five years later that this belief was erroneous.

Shortly after they joined UROC and stopped paying dues to BRT, the appellants were cited to the Railroad by the Brotherhood for violation of the union shop agreement. They received initial hearings before a B. & O. hearing officer and later appeal hearings before another railroad hearing officer. After adverse decisions in these proceedings, they were finally discharged by the B. & O. in 1957.

The present action was then commenced in the District Court by the appellants against the Brotherhood to recover damages resulting from their discharge. The Railroad, although initially brought into the case by BRT, is no longer a party, as it has agreed to reinstate the appellants if the Brotherhood will withdraw its objections. The complaints alleged that the appellants were victims of various discriminatory practices by BRT in that (1) the Brotherhood cited them to the B. & O. for discharge while not citing others who were delinquent in dues payments, (2) that the Brotherhood hastily cited them while delaying considerably

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[2] 45 U.S.C.A. section 153, First.

before citing others, and (3) that BRT discriminated against them in refusing to reinstate them with full seniority.

The complaints also alleged that the defendant union had been unlawfully using dues for political purposes and, because of this, must be forbidden to invoke the union shop provisions against the plaintiffs.

After testimony had been taken, the appellants filed a motion to amend their complaints, and attached the proposed amendment, seeking an order compelling BRT to withdraw its objections to their reinstatement with full seniority as employees of the Railroad. The District Court, after the plaintiffs had presented whatever evidence they desired relative to these allegations, granted the defendant's motions for summary judgment and denied the plaintiffs' motion for leave to amend their complaints asking for reinstatement. The District Judge wrote an extended opinion, discussing the facts of the case in more detail, which is reported at 183 F. Supp. 281.

It is well established that, under both the Railway Labor Act and the National Labor Relations Act, a bargaining agent must fairly and without discrimination represent all employees in the bargaining unit, and that employees discriminatorily treated have recourse to the federal courts. *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood*, 323 U.S. 210 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Conley v. Gibson*, 355 U.S. 41 (1957). On this appeal, the appellants do not press, as they apparently did not in arguments before the District Court,[3] the issue of discrimination in reinstatement as BRT members, but they rely upon discrimination allegedly practiced in the citation of some dues defaulters while excusing others, and in the speedier citation of some than of others.

First, we do not think it unlawful, under the doctrine of the above cases, for the Brotherhood to cite some employees to the Railroad for failure to maintain membership

[3] See 183 F. Supp. at page 287.

in a qualified union more promptly after their default than it cites others. BRT's reason for this was that, as to some, it had greater hopes of persuading them to rejoin. This would seem to furnish a reasonable basis for distinctions in treatment and not to constitute the arbitrary discrimination forbidden by the law.

Assuming that the discrimination in both citation and reinstatement alleged in the pleadings would constitute a cause of action, we have carefully reviewed the record and find that, when given the opportunity by the District Court, the appellants were unable to present any significant evidence of discriminatory treatment.[4] In view of the fact that

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[4] In that court the plaintiffs submitted names of men whom BRT allegedly treated more leniently than the plaintiffs. However, BRT, in affidavits uncontested by the plaintiffs, disclosed persuasive explanations negating discrimination in these cases. This material may be briefly summarized. With respect to those whom BRT reinstated after they stopped paying dues, most of them were reinstated by locals of the Brotherhood in other states which observed a milder policy than the Maryland locals. In the remaining instances, some sought reinstatement prior to the initial hearings before the B. & O. officer, and, according to BRT, if the plaintiffs had asked for reinstatement and tendered their back dues at any time before their initial hearings, they also would have been granted reinstatement. None of the plaintiffs sought reinstatement until after their initial hearings. In the case of others, there were special circumstances justifying the union in making exceptions and restoring them without loss of seniority rights. In the cases of those as to whom it was alleged that they failed to pay dues but were not cited at all, it was shown that they actually were cited, or they had resigned from their employment, or they in fact had not defaulted in dues payments, or there were unusual circumstances warranting special consideration.

The only other evidence submitted to the District Court to support the allegations of discriminatory treatment consisted of the testimony of several of the plaintiffs. Superficially, this testimony might seem to bolster the charge of discrimination in reinstatement, for the plaintiffs testified that the door was closed against their rejoining BRT whereas it was open to others less active than they in UROC. When questioned, however, the plaintiffs were unable to present any evidence tending to show that the Brotherhood failed to apply uniformly the stated policy to allow defaulters to renew their membership up to the time of their initial hearings. As previously mentioned, these appellants did not seek to rejoin the Brotherhood until their appeal hearings.

the appellants, when afforded the opportunity, could offer no substantial evidence of unlawful discrimination, a further trial on the issue would be unwarranted. Upon the showing made, the District Court was not in error in resolving this point against the plaintiffs.

With the issue of discrimination eliminated, we are brought to the appellants' contention that the union shop agreement could not properly be used against them to effectuate their discharge in 1957 because of BRT's alleged use of union dues for political purposes. For that contention to prevail, it would be necessary to hold that such use of dues automatically terminates the Brotherhood's right under the Railway Labor Act to enter into or maintain a union shop agreement.[5] If it be assumed that, the use of dues for political purposes by a union having a union shop agreement, either infringes the constitutional rights of objecting members or violates the Corrupt Practices Act,[6] the invalidation of the union shop agreement does not necessarily follow. There could be less drastic relief than an adjudication of unconstitutionality of the Railway Labor Act as applied here. A milder, and sufficiently effective, form of relief would be to enjoin such misuse of dues. Since we think a remedy other than voiding the union shop would be more appropriate, the plaintiffs could not have the relief they ask in this case even if they established that dues were used for political contributions.

Finally, the District Court did not err in denying leave to file the amendment to the complaint which sought to compel BRT to allow them reinstatement in their employment with full seniority. In the absence of discriminatory treatment by the Union, *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480 (1952), appears to preclude such relief. The present plaintiffs prayed for an order requiring BRT "specifically to withdraw its objections to the reinstatement of plaintiffs in their employment with the Baltimore and

[5] This question is now before the Supreme Court. *International Association of Machinists v. Street*, probable jurisdiction noted, 361 U.S. 807, and recently argued.

[6] 18 U.S.C.A. section 610.

Ohio Railroad Company." This is precisely the relief the plaintiff sought in the *Rychlik* case: "Rychlik, on behalf of himself and other employees of the Railroad similarly situated, thereupon brought this class suit in the United States District Court for the Western District of New York, *seeking an injunction compelling petitioners to accept him as* a member of the Brotherhood and *an employee of the Railroad.*" (Emphasis supplied.) 352 U.S. at page 483. The Supreme Court denied his plea and held that the complaint should be dismissed. To afford the plaintiffs the relief prayed in their proposed amended complaint would be to completely excuse their failure to maintain continuous union membership in a qualified union. Although the equities strongly favor excusing them, as they certainly intended to abide by the union shop agreement and their only default was an understandable inability to predict a Supreme Court decision, we are powerless to grant them the desired relief if we are to be obedient to the *Rychlik* doctrine.

These men would seem to be entitled under the statute only to reemployment as new men, with such seniority rights as are due new employees having their skills and experience, under the Railroad's employment practices and the collective bargaining agreement. The defendant, in its answer to the plaintiffs' motion for leave to amend, agreed that the plaintiffs had the right to be hired as new employees. Thus, the only relief, consistent with *Rychlik*, that could be given under the proposed amended complaint is not contested by the defendant union.[7]

It is unfortunate that these appellants, who always belonged to a union, and who in good faith intended to comply with the union shop agreement, should be restricted to reemployment as new men, with the loss of seniority rights

[7] In fact, apparently the appellants have joined other qualified unions and become entitled as of the date of such membership to seek employment from the Railroad. Reinstatement in BRT would not enlarge plaintiffs' rights over their rights as members of other qualified unions.

earned by faithful service to the Railroad for many years, only because the union to which they belonged for a short period was subsequently held not qualified under the statute. If *Rychlik* did not stand in the way, we should be disposed under these circumstances to order the Union to permit reinstatement with seniority. However, these same equities were present and acknowledged by the Supreme Court in the *Rychlik* case, but it was there held that no federal cause of action existed.

For the above reasons, the decision of the District Court must be

Affirmed.

BRYAN, District Judge, concurring in part and dissenting in part:

The livelihood of the appellant trainmen is, by the opinion of the Court, left subject in a serious degree to the pique of the appellee union. The union shop agreement and the 1951 amendment of the Railway Labor Act are allowed to be the instruments of the subjugation. Solely because the appellants left the union and joined another, the former as their collective bargaining representative has, in retaliation, stripped them of their seniority earned over many years with the Baltimore & Ohio Railroad. This is the gravest of the grievances pleaded by the trainmen. The Court gives them no relief. To this I cannot assent.

I dissent, too, from the affirmance of the denial of a trial to the trainmen in their attack on the validity of the union shop agreement, based on the alleged use of union dues for political purposes. But I concur with the Court in holding that the trainmen made no case for damages for discrimination, initially, in their expulsion from the union and in their original citation to the Railroad as no longer maintaining union membership within the meaning of the agreement. Clarity and the chronology of the pleadings require these three aspects of the suit to be discussed in inverse order to this enumeration of them.

I. The District Court found in the record an unusual haste and promptness by the Brotherhood of Railroad Trainmen in expelling and citing the appellants, but it was of the opinion that this differentiation did not amount to actionable discrimination. I hold this view, too, because the plaintiffs purposefully left BRT and intended to end their membership. The union merely took them at their word, which was hardly a discrimination. For the same reason the Brotherhood was warranted in swiftly citing them to the Railroad and questioning their eligibility for continued employment.

II. The cause of action pitched on the statutory and Constitutional invalidity of the union shop agreement was thought by the District Judge to be beyond his jurisdiction. He noticed the want of diversity of citizenship between the parties; he also concluded it was not a controversy arising under the laws of the United States. But, even if these holdings are sound, there is another basis for jurisdiction. It is that the asserted claim is so intimately related to the other issues, concededly within the competence of the Court, that it should be adjudicated in this cause despite any deficiency in explicit Federal jurisdictional attributes.

The union shop agreement was the very foundation and justification of the citation by BRT. Consequently, the trainmen's claim assailing that contract was a related and inseparable controversy. Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 191 (1909); Hurn v. Oursler, 289 U.S. 238, 242 ff. (1933); Strachman v. Palmer, 177 F. 2d 427 (1 Cir. 1949), 12 ALR 2d 687, with note at 695.

On the worth of the claim, the trial court scrupulously recounted the assertions of the trainmen that BRT from 1928 to 1937 was, and again since January 1, 1956 has continuously been, affiliated with the Railway Labor Executives Association; and that during 1956 and 1957 some of the general funds, including dues received, of BRT were funneled through the Association to the Railway Labor Political League for application to political purposes. The District Judge noted that no dues, therefore, were so ap-

plied in the years 1951-1955, when the union was not associated with RLEA or RLPL. As the expulsion of the plaintiffs occurred in the last period for a default of dues in 1952 and 1953, he felt that the invalidation of the agreement for a misuse of dues occurring subsequent to the expulsion of the plaintiffs would be of no pertinency in this case.

In this I think he erred. The agreement was the constant weapon of the union, throughout, in pressing for the discharge of the plaintiffs, and indeed as late as the spring and early summer of 1957. Not until then were they ousted from their employment. Thus BRT was invoking the agreement against the trainmen both in 1956 and in 1957. If the agreement was avoided, as in contravention of the trainmen's Constitutional rights or of the Corrupt Practices Act, by the union's expenditures in 1956 and 1957, and the union used the agreement in that period to the plaintiffs' hurt, the appellants should be able to recover compensation for the resulting injuries.

I think the plaintiffs were, at least, entitled to a plenary trial on this claim. The District Court has not held that the agreement was or was not vitiated. Finally, that the plaintiffs may have, as the majority opinion intimates, some other remedy than damages on this ground of action is not, in my opinion, an acceptable reason for dismissing the claim.

III. I would allow the proposed amendment which seeks to preserve the trainmen's seniority and return them to the Railroad. Obviously, seniority is the marrow of the union's refusal to consent to the Railroad's restoration of the men in its employment.

The appellants in brief and at the bar asserted that BRT had arbitrarily and vindictively barred their reinstatement to its membership with seniority. It was thus employing the union agreement, they charged, to squeeze them out of their jobs, inasmuch as only one or two unions other than BRT were available to their craft. The argument quite

readily showed that their entitlement to BRT membership without loss of seniority was the issue underlying the prayer of the proposed amendment: that the union be compelled to consent to their reemployment by the Railroad without prejudice.

If, as the opinion of the Court suggests, the trainmen now have the necessary union membership, though in another union, and BRT agrees they may return to B&O's employment as new men, their cause is simplified. The point is that BRT is still using the trainmen's relinquishment of BRT membership, and their entry into UROC, to deprive them of seniority. I think the Act should not be subject to the whim of the union; I think the Act assures them the right of membership in BRT and their former employment undiminished. Otherwise, the statute is utilized to further a selfish aim of the union. Cf. Railway Employe's Dept. v. Hanson, 351 U.S. 225, 238 (1956).

In declining to consent to B&O's acceptance of the plaintiffs with seniority the union violates its obligations as the collective bargaining representative of the trainmen. Its opposition has no base save a determination to punish them for leaving BRT. That the men left in the bona fide belief that they could lawfully change unions is not questioned. That they proved to be mistaken in their understanding of the law — a mistake shared for years by the lower Federal courts — should not bring down upon them crushing penalties — the irretrievable impairment of their livelihood. Notwithstanding, the union has seized upon the error as warrant to use its powers under the union shop agreement and the Railway Labor Act to oppress the trainmen in this very way.

The plaintiffs were never defiant of unionism, the union shop or maintenance of continuous membership. They were never "free riders". They have always been quite willing to pay all back dues. They did prefer another union, and so in good faith they joined the Union of Railroad Operating Crafts. But this was in no wise reprehensible behavior. Indeed, the proviso of the 1951 amendment to the Act explicitly stipulates "that nothing herein or in any such

agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services." This provision, of course, contemplates that the change should cause no disturbance of seniority. UROC was not an outlaw or "splinter" union. The reason it did not qualify under the Act was not that it was not "national in scope, organized in accordance with this Act"; the reason was only that UROC had not qualified as an elector of the union representatives on the National Railroad Adjustment Board. Rychlik v. Pa. R.R. Co., 352 U.S. 480, 485 (1957). Yet the statutory right to change unions is by the Brotherhood subordinated to its own policy.

The bitterly vengeful attitude of the Brotherhood is manifested by its conduct towards the trainmen. On September 3, 1953, within three months after the last withdrawals by the plaintiffs from BRT, the General Chairman of its Grievance Committee rejected an application for reinstatement to the union of a former member because the applicant had joined UROC. This rejection was publicized to all of the plaintiffs as notice of the union's intentions towards them. Not only did the Chairman declare that B&O trainmen having membership solely in UROC were not maintaining requisite union membership, and were not entitled to employment by B&O, but he denounced their separation from BRT as desertion and going "over the hill". He stated that he was "not too much concerned about what" the applicant had to say and depicted him as a supplicant "on bended knees asking for forgiveness".

The plaintiffs had not abused the privilege of transfer from one union to another through undue repetitions. They have done nothing to forfeit their right to rejoin the Railroad unpenalized, if that right is measured upon their good faith, the statute and the agreement, rather than upon the preference of the union. The 1951 amendment discloses a constant solicitude for the employees against an arbitrary exercise by the union of the power vested in it by the

amendment as instrumented by the shop agreement. A strict, constant and delicate sensibility of the bargaining representative to its trust has repeatedly been enjoined upon the union by the Supreme Court. Conley v. Gibson, 355 U.S. 41 (1957). That the factual basis of these cases was race or color does not in the slightest dilute the unequivocal command of fairness they give the bargaining agent.

Equity will relieve the plaintiffs from the injustice and intransigence of the union. It will in the circumstances forbid the union to pursue its objection to the Railroad's unqualified reemployment of the plaintiffs and will award appropriate damages for the union's persistence. In this the court is but enforcing the privilege of the employee under the statute and insisting that the union respect its trust. A bona fide mistake will not be allowed to stand to the prejudice of an honest suitor. A sharper hurt is scarcely imaginable than the destruction, for no wrongdoing whatsoever, of the benefits of a long career of honorable service. Clifton Mfg. Co. v. United States, 76 F. 2d 577, 579-581 (4 Cir. 1935), cert. den. 296 U.S. 622; Winget v. Rockwood, 69 F. 2d 326, 332 (8 Cir. 1934).

Of this dispute the District Court plainly had jurisdiction. It was a fight between employees and union. Again, the union was sued in its detached capacity as their bargaining representative by trainmen not of its body. The Railroad had no place in the action, for it had no quarrel with either party. Conley v. Gibson, 355 U.S. 41 (1957), supra. For these reasons the controversy was not within the province of the National Railroad Adjustment Board.

Nor can I agree with the trial court that those of the appellants known as the Decker suit plaintiffs are precluded in this suit by the National Railroad Adjustment Board's decision on the submission by B&O to NRAB of their discharge. The Board has no power to adjudicate as between those plaintiffs and their bargaining agent. Likewise, Sampsell v. B&O R. Co., 235 F. 2d 569, is mistakenly cited as a sustaining precedent, for it merely held the court to be without original jurisdiction when the contest, as there, was between the railroad and its employees.

The proposed amendment to the complaint was procedurally acceptable; it was in keeping with the original object of the suit. The "presentation of the merits of the action will be subserved thereby". FRCP 15(b). The amendment was simply an expansion of the complaint's first cause of action, and for that reason was not subject to the condemnation of laches. Again, the claim outlined in the amendment is not premised on discrimination in reinstatement into the union—a point expressly waived by the plaintiffs—but on denial of reinstatement with the Railroad with seniority.

Of course, the good faith of the plaintiffs was not significant in their citation initially for discharge by the Railroad, for between the Railroad and its employees the bald status of their unionship was conclusive. Rychlik v. Pa. R.R. Co., 352 U.S. 480, supra; Latham v. B&O R. Co., 274 F. 2d 507 (2 Cir. 1960). But neither of these cases goes beyond that point; they do not consider the issue of restoration with seniority. In Rychlik the Court held UROC an ineligible union, and held nothing more, for nothing else was required for decision. In Latham, no claim was asserted against the union and reemployment and seniority were not in the case. Pp. 509, 510.

The trial on the proposed amendment would not, I think, as the District Court feared, entail complications in the matter of seniority with the other trainmen. As a party to the case a decree for or against the union would bind the other trainmen.

In my opinion the judgment of the District Court should be reversed insofar as it denies the appellants a trial on the claim relating to the validity of the union shop agreement and on the case made by the proposed amendment, but in all other parts it ought to be affirmed.

ON PETITION FOR REHEARING.

(Petition for Rehearing filed March 23, 1961.

Denied September 21, 1961.)

Before SOBELOFF, Chief Judge, SOPER, Circuit Judge, and BRYAN, District Judge.

Herbert M. Brune (Meyer Fix on brief) for Appellants, and Bernard M. Savage (Wayland K. Sullivan on brief) for Appellees.

PER CURIAM:

Action upon the appellants' petition for rehearing was deferred, at the petitioners' request, pending a decision by the Supreme Court in *International Association of Machinists v. S. B. Street.* That case has now been decided. 367 U.S. 740 (1961). We find nothing that supports the contentions of our appellants, either in the plurality opinion of Mr. Justice Brennan in which the Chief Justice and Justices Clark and Stewart joined, or in the opinion of Mr. Justice Douglas, concurring hesitantly to make up the necessary majority, or in the separate dissenting opinions of Justices Black and Whittaker, or in the dissent of Mr. Justice Frankfurter in which Mr. Justice Harlan joined.

In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), the Supreme Court had upheld the validity of §2. Eleventh of the Railway Labor Act (45 U.S.C.A. §152, Eleventh) which authorized collective bargaining agreements requiring employees as a condition of continued employment to belong to an authorized union. Justice Brennan's opinion in the *Street* case, answering the contention of the Union that *Hanson* had already disposed

of the First Amendment claims raised by the discharged employees in *Street*, drew a distinction which is highly significant here. Justice Brennan said:

> "* * * But there was nothing concrete in the record to show the extent to which the unions were actually spending money for political purposes and what these purposes were, nothing to show the extent to which union funds collected from members were being used to meet the cost of political activity and the mechanism by which this was done, and nothing to show that the employees there involved opposed the use of their money for any particular political objective. In contrast, the present record contains detailed information on all these points, and specific findings were made in the courts below as to all of them. * * *" 367 U.S. at 747-48.

Recognizing this distinction, we cannot avoid the conclusion that the record in the instant case is like *Hanson* and unlike *Street*, in that we have here the assertion of objectionable political activity made for the first time several years after the suit had been filed and long after termination of the plaintiffs' union membership. We find in the present record nothing to indicate that opposition by the plaintiffs to the union's political activity or the use of plaintiffs' dues for that purpose was ever voiced while they were members. It does not even appear that such expenditures were made in any of the years before the plaintiffs' expulsion for non-payment of dues. The carefully restricted conditions of liability set forth by Mr. Justice Brennan in *Street* can afford no comfort to these plaintiffs. Mr. Justice Douglas makes it plain that he concurs only on condition that relief shall be confined to the protesting members. Our plaintiffs did not show that they ever registered any protest.

Moreover, even if these appellants succeeded in bringing themselves within the narrow scope of the majority's requirements in *Street* to recover a portion of their dues,

it nevertheless plainly appears from the opinions of seven of the nine justices that the plaintiffs would not in any event be entitled to the primary relief sought—a judgment invalidating the collective bargaining agreement as to them.

The majority of the court finds no ground for departing from its previous holding, to which we felt compelled by *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480 (1957), for the reasons previously stated.

The petition for rehearing must be denied.

Judge Bryan abstains from any action on this petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 561

KENNETH L. HOSTETLER, EARL ALBERTSON, JUNIOR A. AVERS, WALLACE L. AVERS, HUBERT BALL, JOSEPH B. BLACKER, MARVIN D. CLEM, MILTON RICHARD COCHRAN, THOMAS P. COUNIHAN, CURTIS V. DEVELBISS, MAHLON A. LEATHERMAN, DANIEL R. NOBLE, HARLEY M. SAVILLE, GEORGE A. STAFFORD, GEORGE E. THOMAS and RAYMOND F. ZEGLES, *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, AND GENERAL GRIEVANCE COMMITTEE, BROTHERHOOD OF RAILROAD TRAINMEN, BALTIMORE & OHIO SYSTEM, *Respondents.*

JAMES F. DECKER, GEORGE D. BEAL, JOHN D. CLARK, GEORGE H. R. DAVIS, LOUIS R. DAVIS, MICHAEL D. GLEASON, ARCHIE LEWIS, HARRY L. NINES, RAY C. REEB, WILLIAM R. SAMPSELL, FRANK L. G. T. SMITH, FRANK A. TROZZO and JACK W. WHITTINGTON, *Petitioners,*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE BROTHERHOOD OF RAILROAD TRAINMEN AND GENERAL GRIEVANCE COMMITTEE, BROTHERHOOD OF RAILROAD TRAINMEN, BALTIMORE & OHIO SYSTEM, IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 561

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BRIEF OF THE BROTHERHOOD OF RAILROAD TRAINMEN AND GENERAL GRIEVANCE COMMITTEE, BROTHERHOOD OF RAILROAD TRAINMEN, BALTIMORE & OHIO SYSTEM, IN OPPOSITION

The Petitioners seek the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, of September 21, 1961, denying the Petition for Rehearing following

its judgment of February 23, 1961, which affirmed the decision and Order of the United States District Court for the District of Maryland entered on April 27, 1960, granting Respondents' Motions for Summary Judgment and entering judgment in favor of Respondents for costs.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is reported in 287 F. 2d 457 and reprinted in Petition [1] 19-25. Its per curiam opinion on the Petition for Rehearing is reported in 294 F. 2d 666 and reprinted in P. 32-34. The opinion of the United States District Court for the District of Maryland, reported in 183 F. Supp. 281, the Order altering and modifying said opinion, and the Memorandum of Court on Motion for an Order Nunc Pro Tunc, is reprinted in Appellants' Appendix in Court of Appeals [2] 96-110, 120-126.

JURISDICTION

The Petitioners seek to invoke the jurisdiction of this Court under Title 28, U. S. C. A., Sec. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act, 45 U. S. C. A., Sec. 152 Eleventh (a), (b), (c) are reprinted in P. 17-18. Sec. 153 First (i) and (m) are reprinted in Appellees' Appendix in the Court of Appeals [3] 17-18.

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[1] Petition hereinafter designated as P.

[2] Appellants' Appendix in Court of Appeals designated as A.A.

[3] Appellees' Appendix in Court of Appeals designated as Ae. A.

Those provisions of the Criminal Code 18, U. S. C. A. Sec. 610 which are applicable, are reprinted in Ae. A. 15.

QUESTION PRESENTED

Was the Respondent legally entitled to invoke discharge procedures under a valid union shop agreement between the Baltimore & Ohio Railroad Co. (B&O) and the Brotherhood of Railroad Trainmen (BRT) after the Petitioners voluntarily abandoned BRT membership and joined the United Railroad Operating Crafts (UROC), an unqualified union.[4]

STATEMENT OF THE CASE

Petitioners filed their Complaint against BRT, in Hostetler, in July, 1957 and against B&O and BRT in Decker, in November, 1957[5], claiming damages for alleged tortious and wrongful acts resulting in their discharge *from employment as trainmen with the B&O.* On July 31, 1958 (some 5 to 6 years after abandonment of BRT membership), they amended to include allegations of hasty expulsion, prompt citation and unlawful political activities. Respondents' Motions to Dismiss were overruled. Respondents also filed Motions for Summary Judgment (A. A. 27, 29) and during the course of the last argument in March 1960, Petitioners moved for leave to further Amend, asking an Order requiring the BRT's consent to employment reinstatement. Petitioners' Motion (A. A. 30) was denied for, inter alia, laches and estoppel. Summary Judgment

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[4] Membership in Switchmen's Union of North America and Order of Railway Conductors & Brakemen, alternate *qualified* unions, was available to Petitioners.

[5] Both cases being consolidated by order of the lower court dated April 18, 1959 (A.A. 96).

was granted April 27, 1960 (A. A. 110). Petitioners moved to Alter Judgment and Modify Opinion (A. A. 112-120)—this was granted and judgment was stricken as to eleven of the original forty plaintiffs, because of alleged special facts differentiating their cases (A. A. 112, 120).

The Respondents were granted leave in Hostetler to include the B&O as a Third Party Defendant. The B&O's Motion to Dismiss was granted, with leave to file an Amended Third Party Complaint—the filing being deferred by Stipulation (A. A. 95-96). In Decker, the Petitioners' oral Motion to Dismiss the B&O was granted on May 20, 1959 (A. A. 95), following Agreement of Accord and Satisfaction between B&O and Petitioners' Counsel (A. A. 50-51).

On appeal, the granting of Summary Judgment was affirmed (P. 25). A Petition for Rehearing and/or Other Relief was denied (P. 34).

STATEMENT OF FACTS[6]

There is no genuine dispute as to the following material facts upon which the Second Amended Motions for Summary Judgment were granted, (which was after some 17 or more hearings over a period of three years, involving taking of testimony, consideration of affidavits, transcripts of testimony at the initial and appeal union shop hearings, testimony in *Sampsell, infra,* and numerous memoranda of law, as evidenced by a record on appeal, consisting of some 670 pages, exclusive of voluminous exhibits):

1. The Petitioners were already members or became members of the BRT pursuant to the require-

[6] The Respondents believe this statement of facts material to the consideration of the question presented.

ment of the union shop agreement effective October 1, 1951, which required them "as a condition of continued employment" to become members of the BRT within 60 days and thereafter maintain membership in the BRT or in any one of the labor organizations other than the BRT, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in any of said services (A. A. 98).

2. Upon payment of monthly dues, receipts were issued by the Treasurer (Ae. A. 12).

3. The Petitioners voluntarily stopped paying dues to the BRT in 1952 and 1953 (P. 20). "If the dues of any members are not paid by the tenth of the month, it is the practice to enter 'expelled for non-payment of dues' opposite the name of such member, unless he has applied for and received an extension of time for payment." (A. A. 101).

4. Their non-payment of dues to the BRT resulted in expulsion (A. A. 98, 101).[7]

5. Although some Petitioners testified (union shop appeal hearings, A. A. 74, et seq.) they did not receive any kind of formal notice from the BRT that they were no longer members, there was no claim that notice was customarily sent, or, proof that it was sent to anyone.

6. Alleged BRT political activity played no part in the Petitioners' abandonment of membership in

[7] The BRT Constitution, Secs. 118, 119, provides for expulsion without notice or action if dues are not paid before the first of each month (Ae. A. 5).

the BRT in 1952 and 1953, since it did not then exist (A. A. 2, 4). "Dues were not used for that purpose" (A. A. 105), "no dues were used for an improper purpose while plaintiffs (Petitioners) were members of BRT" (A. A. 105) and the claimed political activity was unknown to them until 1958 (A. A. 48).

7. Petitioners withdrew from and deliberately abandoned their BRT membership (A. A. 97 98, 102) and joined UROC, a rival organization (A. A. 97, 98). "By terminating their membership in Brotherhood and ceasing to pay dues to it, they (Petitioners) made themselves subject to discharge by B&O under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under Section 152 Eleventh (c)" (A. A. 103).

8. None of the Petitioners asked to be carried on the BRT membership rolls without paying dues while the status of UROC was being determined (during which time the Petitioners were organizers and officers of UROC, requiring them as loyal UROC members to get new members).

9. "BRT had always contended that membership in UROC was not a sufficient maintenance of union status to satisfy the statutory requirement and to protect plaintiffs' (Petitioners') employment by B&O" (A. A. 98).

10. The Supreme Court of the United States, in Pennsylvania Railroad Company (& BRT) v. Rychlik, 352 U. S. 480, 77 S. Ct. 421 (1957), held that UROC was not 'national in scope' and membership therein was not compliance with the

maintenance of membership provision of the union shop agreement.

11. Petitioners had membership in the Switchmen's Union of North America or the Order of Railway Conductors & Brakemen (alternate *qualified* unions) available to them at the time they stopped paying BRT dues, and, membership therein would have been compliance with the union shop agreement.

12. Petitioners could have "double-headed", i. e., paid dues to both BRT and a *qualified* alternate union, until UROC's status was determined, which would have prevented discharge; some employees did so (A. A. 70, Ac. A. 8).

13. The BRT, which had the responsibility and duty under the union shop agreement to enforce its terms, cited the Petitioners to the B&O for failure to maintain union membership as required (A. A. 98).

14. The charts (A. A. 35, 37-41), stipulated to be substantially correct (A. A. 34), show that none of the Petitioners were cited until October, 1952, which was after the union shop agreement had been in effect one year or more; that 5 were cited in same month of expulsion, and others, from 1½ to 23½ months after expulsion and ½ of these were cited more than 3 months after expulsion.[8]

15. "The difference in the grace period allowed the several plaintiffs (Petitioners) before citation

[8] The charts referred to do not show that 13 were expelled the day following the last date to which dues were paid, as claimed (P. 8). See Hoffman Affidavit (Ac. A. 1) and Opinion (A. A. 101).

resulted from the fact that the chairman of the local lodge deferred for a few months citation of men whom he thought were on the 'fence' and could be persuaded to return to BRT and pay up their dues" (A. A. 102). "It was not the custom of BRT to cite promptly to B&O every man who was expelled for non-payment of dues, but such citation was customarily postponed until the local officers were satisfied that dues would not be paid" (A. A. 101).

16. After claiming in the Second Amended Complaint that many other dues defaulters, similarly situated, were never cited (A. A. 5), Petitioners' Counsel when challenged, produced 22 names and requested a stipulation that these men had not paid dues and yet were not cited. Of the 22, 13 had been cited (Ae. A. 9-10), 8 were BRT members (Ae. A. 3-4), and one was unaccounted for. (P. 22).

17. "The usual notices (citation) were sent, hearings were demanded by each of the plaintiffs (Petitioners) here and those hearings were held" (A. A. 99). At the initial union shop hearings in 1953, at which Petitioners were represented by counsel or UROC representatives, none claimed BRT membership, hasty expulsion, prompt citation, use of dues for unlawful political activities,[9] or refusal to reinstate or readmit them to membership.[10] (A. A. 99). None asked

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[9] It was not until some 5 to 6 years after their abandonment of BRT membership that they claimed for the first time hasty expulsion, prompt citation and unlawful political activities. Amendment to Complaint filed July, 1958.

[10] For an analysis of the evidence on reinstatement, see Footnote 4 of C.C.A. 4 *per curiam* opinion (P. 22).

to pay their dues or asked to remain BRT members without payment of dues. All relied on UROC membership (A. A. 99). The B&O hearing officer found that they "had failed to comply with the terms of the union shop agreement". (A. A. 109).

18. "In each case it was proved that the employee had voluntarily withdrawn from BRT, that he had ceased paying his dues, and that he had joined UROC." (A. A. 99).

19. At the appeal union shop hearings, held in 1955, at which all of the Petitioners, except Lewis, were represented by counsel, they still made no claim of hasty expulsion, prompt citation or use of dues for unlawful political activity, but relied on membership in UROC (A. A. 99). The B&O hearing officer held the Petitioners to be in violation of the union shop agreement, "In that, on the dates of their initial hearing, they did not hold nor had they acquired membership in the Brotherhood of Railroad Trainmen nor in any one of the labor organizations national in scope." (A. A. 99, 109).

20. Claim is not pressed on alleged discrimination in refusal to reinstate in BRT (Opinion, A. A. 103, P. 21).

21. The decisions in both union shop hearings were deferred by agreement for several years, pending legal decisions in other jurisdictions, and, during this period, Petitioners were retained in their jobs at their regular pay.

22. Petitioners had available the remedy of reinstatement with back pay in the event of unjust dismissal, as provided by Rule 7 (d) of the collective bargaining agreement. The disputes of the

Decker Petitioners and some of Hostetler Petitioners were submitted by the B&O to National Railroad Adjustment Board (Board) (A. A. 99), which has exclusive jurisdiction to award this relief, and whose award is final and binding (Railway Labor Act, Sec. 153 First (m) (Ae. A. 18).

23. The Hostetler Petitioners, in May and June of 1957 (before filing of *Hostetler*), executed covenants not to sue the B&O for $100.00 each. In consideration, the B&O agreed to withdraw those Hostetler cases it had already submitted to the Board, and refrain from submitting the balance (A. A. 99).

24. Decker Petitioners attempted to spurn the Board's jurisdiction by refusing to file answering submissions or appear; however, the B&O submissions fully presented the Petitioners' contentions and the Board sustained the action of the B&O in terminating their employment. (A. A. 99, 107-108)

25. When notified of the intended dates of dismissal, the Petitioners[11] sought an injunction in *Sampsell* v. *B&O and BRT, et al.*[12] to restrain their discharge. They were retained in their jobs at the regular wages (by Stipulation and Injunction) until that proceeding (including appeals) was concluded, after which they were discharged in 1957.

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[11] Except Blacker, Lewis, Thomas and Zegles.

[12] D. C. Md., No. 8804 Civil, unreported (1956). Granting of Motions to Dismiss affirmed, C.C.A. 4, 235 F. 2d 569 (1956), cert. den., 352 U. S. 941, 77 S. Ct. 261 (1956), Pet. for Rehearing den., 352 U. S. 998, 77 S. Ct. 554 (1957).

26. Decker Petitioners originally sued the B&O and BRT. Following Petitioners' Agreement of Accord and Satisfaction with the B&O, they orally moved to dismiss the B&O and their motion was granted (A. A. 95).

27. Counsel for Petitioners stated, before the Motions for Summary Judgment were decided, "that any other testimony would be merely cumulative to that of Hostetler and Leatherman on the issues common to most of the plaintiffs (Petitioners) (A. A. 125), and, agreed the record was closed. (A. A. 126)

ARGUMENT

REASONS FOR DENIAL OF WRIT

I. No conflict exists in the decisions of the Circuit Courts of Appeal.

Both the Union Shop Amendment [1] and the union shop agreement contemplate *continuous* membership by payment of dues to a qualified union. *Alabaugh* v. *B&O*, D. C., Md., 125 F. Supp. 401 (1954), aff. C.C.A. 4, 222 F. 2d 861 (1955), cert. den., 350 U. S. 839, 76 S. Ct. 77 (1955); *Rychlik* v. *Pennsylvania Railroad Company* (& *BRT*), D. C. N. Y., 128 F. Supp. 449 (1955), rev. C.C.A. 2, 229 F. 2d 171 (1956), rev. 352 U. S. 480, 77 S. Ct. 421 (1957). It was as an answer to the question "* * * whether those who enjoy the fruits and benefits of unions should make a fair contribution to the support of the unions" that the union shop provision of the Railway Labor Act was enacted. See *Railway Employees Department* v. *Hanson*, 351 U. S. 225, 76 S. Ct. 714 (1956); also, *International Associa-*

[1] 45 U. S. C. A., Sec. 152 Eleventh, approved January 10, 1951, Public Law 914, 81st Congress 2nd Session, 64 Stat. 1238, Ch. 1220 (Ac. A. 16-17).

tion of Machinists v. *Street*, 367 U. S. 740, 81 S. Ct. 1784 (1961).

The Petitioners ceased paying dues to the BRT and failed to acquire alternative membership in other qualified unions, "conterminously",[14] although available to them. They were then cited[15] by the BRT as being

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[14] This was a breach of the union shop agreement (*McNamar* v. *B&O and BRT*, D. C. Ind., 158 F. Supp. 835 (1957), aff. C.C.A. 7, 254 F. 2d 717 (1958); *Alabaugh* v. *B&O supra*) which "permitted the BRT to exercise its rights under the terms of the Union Shop Agreement, *i.e.*, to notify the carrier of his (Petitioners) failure to comply with the terms of the Agreement and to insist that he (Petitioners) was no longer entitled to continue in employment." *McNamar* v. *B&O and BRT*, C.C.A. 7, *supra*; (See also *Sams* v. *Brotherhood of Railway and Steamship Clerks*, D. C., So. Car., 166 F. Supp. 49 (1956), aff. C.C.A. 4, 233 F. 2d 263 (1956); *Latham* v. *B&O Def. and BRT, Third Party Def.*, D. C. N. Y., Civil Action 7050 unreported, (1958), aff., C.C.A. 2, 274 F. 2d 506 (1960); *Shiels* v. *B&O*, D. C. Ind., 154 F. Supp. 917 (1957), aff., C.C.A. 7, 254 F. 2d 863 (1958), cert. den., 358 U. S. 846, 79 S. Ct. 71 (1958), Pet. for Rehearing den., 358 U. S. 896, 79 S. Ct. 155 (1958); *Hasler* v. *BRT*, D. C., Ohio, Civil Action 4953 unreported (1961).

[15] In the Supplemental Affidavit of B. G. Herbig (Examiner, Personnel Department, B&O) filed in support of B&O's Application for Judgment, he states:

> "1. The examination of the files covering union shop violation charges against trainmen on the B&O covered approximately 1800 such files.
>
> 2. Those files show that the Brotherhood was strictly enforcing the union shop obligation of dues payment. A vast majority of the 1800 violations charges concerned individuals who were either ordinary non-members or simple dues-delinquents, rather than individuals who were attempting to transfer to an exclusive membership in some rival new labor union, such as the United Railroad Operating Crafts (hereafter 'U.R.O.C.'). In other words, most of the individuals concerned in these charges had simply neglected to make prompt payment of their dues as required by the laws of the Brotherhood of Railroad Trainmen."

in non-compliance with the union shop agreement for non-payment of dues. Upon request, they had hearings before the B&O trainmaster, and on appeal, after adverse decisions, before Mr. B. G. Herbig, Examiner, Personnel Department, B & O, who also found them in non-compliance. They were subsequently discharged.

The facts, as related above, are identical with those involved in *McNamar* v. *B&O and BRT*, C.C.A. 7, *supra*; *Shiels* v. *B&O*, C.C.A. 7, (cert. den.), *supra*; *Latham* v. *B&O, Defendant and BRT, Third Party Defendant*, C.C.A. 2, *supra* (discrimination also being alleged in the three cases), where the Second and Seventh Circuit Courts of Appeal affirmed the *granting of Summary Judgment* to the Defendants by their District Courts.

The National Labor Relations Board (Labor Board) cases cited by the Petitioners, were actions under the National Labor Relations Act as amended,[*] where "employees under a union shop contract governed by that Act must join and maintain membership in the union designated as the bargaining representative or suffer discharge" (*Pennsylvania Railroad Company (& BRT)* v. *Rychlik, supra*), as distinguished from the Railway Labor Act where employees could satisfy the union shop requirement by holding membership in any other alternate qualified labor organization (two of which were available to Petitioners). They are clearly distinguishable on the facts.

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[*] 61 Stat. 136, 29 U. S. C. A., Sec. 158 *et seq.* Employees under a union shop agreement governed by this Act may lodge charges with the Labor Board which investigates the charges, issues complaints, etc.; its final order is subject to judicial review. Under the Railway Labor Act, two union shop hearings are held by the railroad officials and then *either* party may refer it to the Board for determination, whose award shall be final and binding upon *both* parties (Ac. A. 17, 18).

The Petitioners also rely upon *Cunningham* v. *Erie Railroad Company*, C.C.A. 2, 266 F. 2d 411 (1959), in support of their contention that the decision of the Fourth Circuit is contrary to the view prevailing in other Circuits. They say (P. 10), "* * * substantial discrimination or hostile motivation in the invocation of the union security contract provisions was alleged or shown and * * * the court held that these facts, if found, would justify relief against the union bargaining representative * * *". This was the only cited Circuit Court case in which a violation of the Railway Labor Act was alleged. There, Cunningham refused to pay his union dues "until some action was taken regarding * * * seniority rights", which the Court interpreted as charging in substance that "he was wrongfully deprived of his seniority rights and that because he had the timerity to stand up for his rights and refused to pay his union dues he was deprived of his union membership and discharged from the employment of the railroad for a reason other than the non-payment of union dues." Reversing the judgment of the District Court dismissing the complaint, Judge Medina said (416, 417):

> "As we have already indicated, in order to establish a breach by the union of its duty to represent the employees fairly, as the bargaining representative of the employees sanctioned by statute, it is not enough to prove that the union was wrong in demanding Cunningham's dismissal. This duty was no more than to forebear from 'hostile discrimination'. The arbitrariness shown must be of the bad faith kind. As Justice Stone suggested in Steele, 323 U. S. at page 203, 65 S. Ct. 226, it is not violative of federal law that the union not satisfy all employees or that it improperly balance the rights and obligations of the various groups

it represents. Something akin to factual malice is necessary * * *."

Cunningham was decided by the Second Circuit on May 4, 1959. On January 15, 1960, the same Court decided *Latham* where the facts were the same as those of the instant case. The appellants there, in support of their contention, relied upon the Court's decision in *Cunningham*. In disposing of this, Judge Medina said (510):

"* * * There we found there was a triable issue, whether Cunningham's union membership had or had not been terminated for a 'reason other than the failure of the employee to tender the periodic dues.' As this issue had not been resolved in the finding made in the District Court after a non-jury trial, we remanded the case for retrial. We are at a loss to perceive how this ruling in Cunningham helps appellants. There could not possibly have been any discrimination connected with their voluntary act of resigning from the Brotherhood in order to join UROC."

Continuing, he said (511):

"The comment by Chief Judge Swygert in McNamar, which incidentally was an action against both the railroad and the Brotherhood, 153 F. Supp. at page 839, and quoted in the reasoning of the District Court approved by the Seventh Circuit in Shiels, is equally applicable to appellants in the case before us. He said:

'Once it becomes apparent that the plaintiff initially, voluntarily and deliberately breached the Union Shop Agreement, the motives which prompted the defendants to act within their contractual and statutory rights are immaterial.'

"This is a far cry from Cunningham. The plain fact of the matter is that there never was any

> *genuine issue* in the case (Latham) other than the dispute concerning the status of UROC as a union 'national in scope'. When Rychlik was decided by the Supreme Court this issue was disposed of with finality and appellants' case collapsed." (emphasis ours).

II. There is no conflict in this decision with any of the Supreme Court.

The requirement that membership be continuous by payment of dues to a qualified labor organization, was within the purview of the Union Shop Amendment to the Railway Labor Act. *Rychlik* v. *Pennsylvania Railroad Company (& BRT), supra.* It is not violative of the First or Fifth Amendments. *Railway Employees Department* v. *Hanson, supra.* Being legally sanctioned, therefore, the action of the bargaining representative in invoking the discharge procedures of the union shop agreement for non-compliance with this requirement, *i.e.*, failure to acquire membership in an available qualified alternate labor organization at the time of abandonment of BRT membership, does not give rise to a federal cause of action.

> "* * * Since UROC was not so qualified, respondent had no federal right to join it in lieu of the authorized bargaining representative under the union shop provision of the Railroad-Brotherhood contract. His discharge by the petitioners therefore did not give rise to a federal cause of action." *Pennsylvania Railroad Company (& BRT)* v. *Rychlik, supra,* p. 485.

Petitioners argue that the Circuit Court misapplied this Court's decision in *Rychlik* which they say (P. 12, 13) does not deal with the problem of discrimination and "is patently inapplicable". The Fourth Circuit (as did Judge Thomsen) found no "arbitrary" or

"unlawful" discrimination (P. 22, 23), and, in applying *Rychlik*, said (P. 23):

> "* * * In the absence of discriminatory treatment by the Union, Pennsylvania R. Co. v. Rychlik, 352 U. S. 480 (1952) [1957], appears to preclude such relief." (reinstatement in their employment with full seniority)

It is obvious the statement "appears to preclude such relief" is an adoption of this Court's ruling "no federal cause of action existed" (P. 25), even though, as stated by Mr. Justice Harlan in Rychlik (p. 482):

> "* * * At that time he resigned from the Brotherhood and joined United Railroad Operating Crafts (UROC), a competing union which respondent believed in good faith to be 'national in scope' and 'organized in accordance with' the Act, and therefore available for alternative membership * * *."

In the instant case, Judge Thomsen, with respect to the "hard feelings on the part of BRT officials against men who joined UROC, especially the organizers and leaders of the movement", faster citation of some men than others, and, "distinctions were made on the basis of UROC activity" as whether or not to expel, cite or readmit the men, said (A. A. 124):

> "* * * Those distinctions might be called discrimination in other contexts, but if the legal principles quoted, discussed and adopted by this Court are sound, those distinctions do not amount to actionable discrimination in this case. * * *"

And, as to faster expulsion of some of the Petitioners than other men, he said (A. A. 125):

> "* * * that might be called discrimination, for certain purposes. But it is not actionable discrim-

> ination under the legal principles which I have found to be applicable in this case. * * *"

As to more prompt citation of some then others, the Circuit Court, in its *per curiam* opinion said (P. 22):

> "* * * BRT's reason for this was that, as to some, it had greater hopes of persuading them to rejoin. This would seem to furnish a reasonable basis for distinctions in treatment and not to constitute the arbitrary discrimination forbidden by law."

And, with reference to discrimination in citation and reinstatement, it said (P. 22):

> "* * * We have carefully reviewed the record and find that, when given the opportunity by the District Court, the appellants were unable to present any significant evidence of discriminatory treatment. * * *"

Judge Bryan (concurring in part and dissenting in part and on whose opinion Petitioners rely), in concurring with the District Court's opinion that the differentiation in haste and promptness in expulsion and citation did not amount to actionable discrimination, said (P. 26):

> "* * * I hold this view, too, because the plaintiffs purposefully left BRT and intended to end their membership. The union merely took them at their word, which was hardly a discrimination. For the same reason the Brotherhood was warranted in swiftly citing them to the Railroad and questioning their eligibility for continued employment."

Rychlik was discharged in January of 1955 and shortly thereafter filed his Complaint, seeking, *inter alia*, a permanent injunction for reinstatement to employment. Upon hearing on a show cause order in

February of 1955, the relief was denied, 128 F. Supp. 449. In the instant case, it was not until March of 1960, nearly 3 years after the filing of their original Complaints, that Petitioners "at close of final argument with the current running against them" (A. A. 108) asked leave to further amend their Complaint to seek an alternative "equitable relief requiring the BRT to consent to the reinstatement of plaintiffs with their old seniority". (A. A. 109). The BRT interposed objections including laches and estoppel. Judge Thomsen, in denying Petitioners' motion, held (A. A. 109, 110), that the relief prayed was within the exclusive jurisdiction of the Board, *Sampsell* was res adjudicata on the question of jurisdiction, estoppel of Decker Petitioners by Board awards; also,

> "Moreover, the relief sought by the proposed amendment is barred by laches and estoppel. The plaintiffs were cited in 1952 and 1953, were held to be in violation of the Union Shop Agreement by the B&O hearing officer in 1954 and 1955, were again held by the B&O appeals hearing officer, in early 1957, after the decisions in Alabaugh and Sampsell, to have been in violation of the Union Shop Agreement at the time of their initial hearings, and were thereafter discharged from their employment with the B&O in April, May and June of 1957. In March, 1960, they pray, for the first time, restoration to their employment with seniority. No such claim was made in the Complaints filed in Hostetler on July 12, 1957, and in Decker on November 8, 1957, nor in the Hostetler Amendment to Complaint filed on July 31, 1958, nor in the Decker Amendment to Complaint and Second Amended Complaint filed on June 15, 1959. Plaintiffs at any time after their discharge had the right to be hired as new employees and be placed at the bottom of the seniority roster."

Reinstatement to employment is a relief within the exclusive jurisdiction of the Board. If an employee, discharged for a union shop violation, were permitted to "run into court" about it by bringing an action solely against his union, claiming that rights under a statute are involved, then, "* * * it would breed endless confusion and virtually nullify the administrative remedy which Congress has been at pains to provide. * * *" Alabaugh v. B&O, C.C.A. 4, supra.

Rychlik (as do the Petitioners), claimed that after resignation from the BRT, the BRT refused to reinstate him. Chief Judge Knight, of the District Court, in disposing of this, said (455):

> "* * * There appears to be no grounds for the equitable intervention of this Court for such refusal. A like question was discussed by the court in Alabaugh v. Baltimore & Ohio Railroad Co., supra, wherein the court, 125 F. Supp. at page 407, said:
>
> > 'When plaintiffs applied for reinstatement in Brotherhood, it was within the discretion of that organization whether or not they should be reinstated. There is no provision in the statute or in the agreement with B&O which requires such action.
> >
> > 'The courts cannot require individuals or associations to be forgiving or generous nor prevent the operation of the rule that 'they that take the sword shall perish with the sword' unless some constitutional or other legal right or immunity is threatened. Nor does the action of Brotherhood in reinstating some members who had been less active in UROC create any right in plaintiffs to secure an order for reinstatement in this case.

> 'So far as Brotherhood's refusal to reinstate plaintiffs affects their discharge by B&O, it is clearly a dispute similar to those which the courts have held to be within the primary jurisdiction of the Adjustment Board.' "

Petitioners do not argue a conflict of opinion with *Street*, supra, or the applicability of it, but raise a question of whether they are entitled to similar relief (P. 6). The reasons for denying them relief are fully stated in the per curiam opinion of the Circuit Court on the Petition for Rehearing (P. 32-34). Further elaboration or repetition would serve no useful purpose.

Neither *Steele* v. *Louisville & N. R. Company*, 323 U. S. 192, 65 S. Ct. 226 (1944) nor *Conley* v. *Gibson*, 355 U. S. 41, 78 S. Ct. 99 (1957) (both negro discrimination cases), nor *Radio Officers' Union, etc.* v. *National L. R. Bd.*,[17] 347 U. S. 17, 74 S. Ct. 323 (1954) cited by the Petitioners, involved voluntary abandonment of membership in a qualified labor organization and a failure to simultaneously acquire membership in a qualified alternate union, as in the instant case.

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[17] Consists of three cases. *Teamsters* involved reduced seniority for non-payment of dues, as contained in union by-laws (union security provisions ineffective because of lack of authorization then required by Act); seniority list containing both union and non-union members; Labor Board found unfair labor practice, ordered withdrawal of request for reduction in seniority, offer of restoration to former status, etc.; C.C.A. 8 refused to enforce order; this Court reversed. *Radio Officers* involved refusal of union to give clearance; Labor Board, holding that employee was in good standing in union at all material times, found unfair labor practice and ordered withdrawal of objection to employment, offer of employment, etc.; C.C.A. 2 granted petition for enforcement of order; this Court affirmed. *Gaynor* involved retroactive wage increase and vacation payments only to union members; Labor Board, finding unfair labor practice, ordered non-union employees similarly situated to be made whole; C.C.A. 2 granted enforcement of order; this Court affirmed.

III. Petitioners agreed to have the basic legal questions decided on summary judgment.

The Honorable Judge Thomsen, in his opinion, stated (A. A. 123):

> "* * * At the time the motions for summary judgment were argued, it was my clear and distinct understanding that counsel for plaintiffs, as well as counsel for defendants, thought it was desirable to have the basic legal questions common to all of the cases disposed of on motion for summary judgment, for the following reasons * * *".

The Petitioners were not desirous of presenting any additional evidence on the issues involved.[18] "Any other testimony would be merely cumulative". (A. A. 125). On March 17, 1960, the following colloquy occurred (A. A. 126):

> "The Court: I have been asked to hear oral argument. There has been no oral argument since the last briefs were filed.
>
> "I understand however before we start that both sides agree that they have filed in court all papers, all exhibits and have taken all testimony which they feel necessary to be taken on the various motions which are now pending before the Court including the motion for summary judgment. Is that correct?
> "Mr. Brune: Yes.
> "Mr. Savage: Yes.
> "The Court: Then I understand the record is closed on these motions, and I will be glad to hear from both sides."

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[18] Except "to bring out any special facts involving Mr. Legeer and possibly one or two others" (A. A. 125). After summary judgment, however, Petitioners filed Motion to Alter or Amend Judgment as to eleven plaintiffs, alleging special facts differentiating their cases from the others (A. A. 112-115). The Motion was conditionally granted, upon filing of affidavits to show that their cases presented special questions (A. A. 120).

CONCLUSION

From filing of the Complaints in July and November of 1957 until granting of Summary Judgment in April of 1960, there were over 17 separate hearings. Petitioners, who claimed hostile and arbitrary discrimination, were given a wide latitude to present proof; yet "were unable to present any significant evidence of discriminatory treatment" and "could offer no substantial evidence of unlawful discrimination" (P. 22, 23), leaving no genuine issue as to any of the material facts. Petitioners have never claimed they were precluded from offering additional evidence.

They claim they are entitled to a plenary trial before a jury, based on the evidence, which both the trial and appellate court found was not actionable discrimination. It would seem futile to take "several months" to present "cumulative evidence" not constituting actionable discrimination and furnishing only the basis for a directed verdict.

Street limits relief to recovery of that part of dues used for unlawful political activities or injunction to restrain such use, to those who protest. "Our plaintiffs (Petitioners) did not show that they ever registered any protest" (P. 33).

For the aforegoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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